IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1837 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANJITSINGH RANJITSINGH

Versus

JATINDERKAUR D/O SURJITSINGH AJABSINGH

Appearance:

MR TS NANAVATI for the Petitioner.

PAWANKUMAR N for the Respondent.

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 05/04/2004

ORAL JUDGEMENT

Today, Mr.Nanavati, learned Advocate for the petitioner, is present. Mr.Pawankumar, learned Advocate for the respondent, is also present.

Mr.Nanavati submitted that he could not remain present on 31.3.2004 because of some religious ceremony in connection with the death of his father. He, therefore, requested that the order of payment of costs may be recalled. Mr.Pawankumar, after taking instructions from his client, who is present in the Court, submitted that the respondent is not pressing for the amount of costs. In view of this, so far as the order, imposing costs of Rs.5,000/-, is concerned, the same is recalled.

This CRA now to proceed further on its own merits.

The petitioner herein instituted matrimonial proceedings for getting decree for divorce under Section 13 of the Hindu Marriage Act, 1955. The matter was registered before the trial court as H.M.P. No.74 of 1996. In the aforesaid proceedings, the trial court passed an ex parte decree by order dated 19.4.1997, by which the marriage between the parties stood dissolved by the decree for divorce granted by the trial court. The respondent, who is residing at Delhi, subsequently, filed an application for setting aside the ex parte decree on various grounds.

The case of the respondent-wife is that the aforesaid petition, being HMP No.74 of 1996, was kept on 6.11.1996 for serving summons, but she was served with the summons by registered post A.D. only on 8.11.1996. According to the respondent, since she was residing in Delhi, when she contacted the local Advocate, she was advised to wait for receiving another summons, as the date of earlier summons had already gone. In the meanwhile, having come to know about the said fact of institution of the divorce petition, she moved the Supreme Court in the month of March, 1997 for transferring the aforesaid H.M.P. No.74 of 1996, to the Delhi Court. It is her case that during the pendency of the said transfer petition, in view of the stand taken by the husband, she came to know about the ex parte decree passed by the trial court in her absence and, therefore, an application for setting aside the ex parte decree was moved before the trial court, by preferring an application on 5.9.1997. Since the suit was already decreed, the respondent withdrew the transfer application from the Supreme Court on 27.7.1998, as, at that time, the application for setting aside the ex parte decree, was already pending before the trial court. Subsequently, the trial court proceeded with the

application filed by the respondent for setting aside the ex parte decree and, ultimately, by its order dated 30th October, 1998, allowed the said application preferred by the respondent and the ex parte decree passed in HMP No.74 of 1996, was set aside by the trial court by the impugned order and HMP No.74 of 1996 was restored to the file by the trial court. It is the aforesaid order which is challenged by the petitioner-husband by way of the present revision application by invoking Section 115 of the Code of Civil Procedure.

Since the original proceedings were restored on file, the present respondent again moved the Supreme Court by filing Transfer Petition (C) No.5 of 1999 for the purpose of transferring HMP No.74 of 1996 from the Court of Civil Judge (Senior Division), Bharuch to the Court at Delhi, and it is pointed out by the learned Advocates for both sides that by order dated 19th March, 1999, the aforesaid proceedings are transferred from the Court of Civil Judge (Senior Division), Bharuch (Gujarat) to the District Judge, Delhi, or any other appropriate competent court in the Tiz Hazari Courts of Delhi. However, in the meanwhile, the petitioner has already filed this Civil Revision Application, challenging the impugned order, by which the original suit is restored to file.

Mr.Nanavati, who is appearing for the petitioner-husband, vehemently pointed out that the respondent herein has not given sufficient reasons before the trial court for setting aside the ex parte decree passed in HMP No.74 of 1996. Mr.Nanavati submitted that, even otherwise, after the decree of the trial court, his client has re-married and, therefore, the trial court should not have restored the matter on file in view of the subsequent development. Mr.Nanavati submitted that his client has re-married on 14.7.1997 in view of the decree passed by the trial court and, therefore, even if sufficient ground is made out, the Court should not have restored the matter in view of the subsequent event, which has taken place. He submitted that his client waited for expiry of the limitation period and, thereafter, he has re-married.

Mr.Pawankumar, learned Advocate for the respondent, on the other hand, submitted that the trial court has given appropriate reasons for setting aside the ex parte decree. He further submitted that since the summons of the trial court was served at a later point of time, and the date which was mentioned in the summons had already expired, the respondent was given an advice by

the Advocate that she will receive fresh summons and thereafter, she can appear before the trial court. It is submitted by Mr.Pawankumar that when the other side pointed out, when the transfer petition was pending, that the decree is already passed in HMP No.74 of 1996, immediately, application was made before the trial court for setting aside the ex parte decree. It is also pointed out by Mr.Pawankmar, for the respondent-wife, that the so-called second marriage of the petitioner took place on 4.7.1997, but before that date, the petitioner-husband had already appeared before the Supreme Court in the transfer case and, therefore, when he contracted the second marriage, he was very much aware that the petition for transfer of HMP No. 74 of 1996 to the Delhi Court, was pending before the Supreme Court. He, therefore, submitted that solely on the ground of second marriage, the order of the trial court is not required to be disturbed by this Court in a revision filed under Section 115 of the Code of Civil Procedure, as, in his submission, the trial court has not committed any error of jurisdiction in setting aside the ex parte decree and restoring HMP No.74 of 1996 to the file.

I have heard learned Advocates for both the sides in detail and, in my view, this revision is absolutely without any substance. It is not in dispute that the first date, which was mentioned in the summons was 6.11.1996. However, that summons was served by registered post A.D. only on 8.11.1996, and by that time, the date by which the respondent was required to appear before the trial court was already over and, therefore, naturally, as per the legal advice, she was awaiting fresh summons for the purpose of appearing before the trial court.

In the meanwhile, she approached the Supreme Court for transfer of the aforesaid case to the Delhi Court. Under these circumstances, in my view, the trial court committed unnecessary haste by not even issuing fresh summons to the respondent. It was the duty of the concerned Court to verify as to on which date the summons was served on the other side. Since the original date for service of summons had already expired, it was not expected from the respondent to appear before the Court and, there is nothing wrong in waiting for fresh summons from the Court. The trial court, therefore, failed in its duty by not issuing fresh summons to the respondent and, ultimately, passed an ex parte decree for divorce, by which the marriage in question is dissolved by the said decree. The trial court has, therefore, considered the aforesaid aspect and since the trial court has

satisfied itself that there is sufficient cause for setting aside the ex parte decree, has allowed the application preferred by the respondent and accordingly, HMP No.74 of 1996 was restored to file after setting aside the ex parte decree.

Considering the aforesaid factual aspect, in my view, the respondent has clearly made out the case for setting aside the ex parte decree as the summons of the Court itself was not served on her. By unnecessary haste on the part of the trial court unfortunately, she is required to suffer by running from pillar to post. The respondent, therefore, cannot be blamed for not moving the application immediately on passing of such ex parte decree, because that fact was brought to light only when she preferred transfer application before the Supreme Court.

Mr.Nanavati, however, argued that in view of the second marriage of the husband, the trial court should not have restored the matter. It is, however, required to be noted that the petitioner was aware about this factual aspect that the respondent has already moved the Honourable Supreme Court for transfer of the aforesaid H.M.P. from Bharuch to Delhi. In spite of the fact that the transfer application was pending before the Supreme Court and the said fact was within the knowledge of the petitioner, he contracted the second marriage on 14.7.1997. This fact, as such, that the so-called second marriage has taken place on 14.7.1997, is not in dispute. The first transfer application was withdrawn on 27.7.1998 in view of the ex parte decree. Therefore, on the ground of second marriage, the respondent cannot be deprived of her right to contest HMP No.74 of 1996, on its own merits. By the impugned order, substantial justice has been done to the respondent and she has been permitted now to contest the original proceedings on its own merits. It is required to be noted that for no fault on her part, she could not contest the original proceedings as the summons was served to her after the date for service of summons has already expired. Under these circumstances, this revision application is thoroughly misconceived. The trial court is absolutely justified in restoring HMP No.74 of 1996 to the file. The revision application is, therefore, dismissed. Rule is discharged, with costs quantified at Rs.5,000/-.

During the pendency of this CRA, by order of the Supreme Court dated March 19, 1999, HMP No.74 of 1996 is already ordered to be transferred to the Court of District Judge, or any other appropriate competent court

in the Tiz Hazari Courts of Delhi. This revision application was preferred in the year 1998 and the transfer order of the Honourable Supreme Court is of March, 1999 and, therefore, the proceedings are not yet transferred to the Court, to which it is required to be sent as per the order of the Honourable Supreme Court. Now, in view of the dismissal of this CRA, the said order of the Honourable Supreme Court is required to be complied with forthwith and proceedings pending before the Bharuch Court are required to be transferred to the Court at Delhi as per the order of the Supreme Court.

Xerox copy of the writ of the order of the Supreme Court is placed on record by both the sides. But, it seems that there is some mistake in mentioning the number. Instead of HMP No.74 of 1996, it is mentioned as HMP No.74 of 1998. Mr.Pawankumar for the respondent submitted that the respondent will take appropriate proceedings for correcting the number, if there is any mistake in the original order in connection with the number of the aforesaid case. After such transfer, the petitioner is directed to deposit the costs before the Delhi Court, as quantified above, and on such deposit, the respondent shall be entitled to withdraw the same unconditionally.

Writ to be sent to the trial court for complying with the order of the Honourable Supreme Court.

5th April, 2004 (P.B. Majmudar, J.)

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(apj)